Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-965

JAMES A. FARRELL and LOUIS T. DILORENZO,
Petitioners,

v.

HUGH CAREY, as Governor of the State of New York, ERNEST L. BOYER, as Chancellor of the State University of New York, and ALBERT W. BROWN, as President of the State University College at Brockport,
Respondents.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The State argues that Petitioners cannot be heard in this Court upon the constitutional issues presented, squarely framed by the pleadings and fully decided by the courts below, because Petitioners should have first secured an arbitral determination of the effect of the collective agreement:

> The issue is *whether* the grievance procedure *could* have aired the factual issues concerning the basis for petitioners' termination and that was never reached because petitioners both failed to exhaust that remedy. Brief in Opposition at 5 (emphasis added).

An arbitrator was never called on to consider the question because Petitioners agreed with the State's interpretation of the collective agreement. Petitioners' pleadings asserted that the instant collective agreement impermissibly bargained away their constitutional right to contest the existence of the ground asserted as justifying their dismissals and the reasonableness of the standards and procedures employed to single them out for termination. The State's Motion to Dismiss did not contend that the collective agreement allowed review of these questions. Rather, the State relied upon a theory of waiver of due process: that, under *Antinore* v. *State of New York*, 371 N.Y.S.2d 213 (4th Dept. 1975), *aff'd mem.*, 40 N.Y.2d 921, 358 N.E.2d 368 (1976), it was constitutionally irrelevant that Petitioners could not vindicate their constitutional rights. The State could have moved to dismiss upon the ground that the collective agreement did not foreclose review of the procedures and standards employed to terminate these professors, thereby placing that question in issue; but, the State did not challenge Petitioners' reading of the collective agreement. The only question raised and passed upon below was whether it is constitutionally permissible for a public sector collective agreement to do just what the parties agreed it did, that is, waive the individual's constitutional right to due process. Accordingly, under New York law, there was nothing to arbitrate—there was no procedure to exhaust—because the parties agreed about the effects of the collective agreement and differed only upon the constitutional permissibility of those effects.*

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* The State points out that "This Court has held that there is a 'strong presumption favoring arbitrability'. . . ." citing a series of cases under federal labor law. Brief in Opposition at 5. That presumption is irrelevant, however, where the parties are agreed as to the purport of a collective agreement and differ only as to the permissibility of a provision under external law, *i.e.*, as to legal questions an arbitrator is not empowered to decide. In any event, the State also neglects to point out that there is no such presumption under New York's public employment bargaining law:

> [I]n arbitrations which proceed under the authority of the Taylor law, the scope of the particular arbitration clause, and thus whether the question sought to be submitted to arbitration is within or without the ambit of that clause, is to be determined by the courts. In making such determinations the courts are to be guided by the principle that the agreement to arbitrate must be express, direct and unequivocal as to the issues or disputes to be submitted to arbitration; anything less will lead to a denial of arbitration. *Acting Superintendent* v. *United Liverpool Faculty Ass'n*, 42 N.Y.2d 509, 510-511, 369 N.E. 2d 746, 747, 399 NYS 2d 189, 190 (1977) (emphasis added).

This decision was briefed by Petitioners and argued to the Appellate Division in the instant case. Under it, in order for there to be anything for Petitioners to exhaust, the State would have had to dispute Petitioners' pleadings and assert that Petitioners could secure arbitral review of the merits of their dismissals; the State did not then so assert, nor does it now.

It should be noted that the growth of public sector collective bargaining engenders a host of constitutional questions which this Court has commenced to resolve. *City of Madison* v. *WERC*, 427 U.S. 167 (1976), *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). A major question, which this Court has not yet reached, is whether the State may limit an individual's constitutional rights by agreement with a public employee union; that is, whether a public employee union may "waive" rights protected by the fourteenth amendment. Note, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation*, 89 Harv. L. Rev. 752, 777-780 (1976); Baird & McArthur, *Constitutional Due Process and the Negotiation of Grievance Procedures in Public Employment*, 5 J. Law & Educ. 209 (1976); *Cf.* Note, *Union Waiver of Constitutional Rights: Academic Freedom as a Bargaining Chip in Teacher Contracts*, 49 Colo. L. Rev. 299 (1978). The disposition below frames that issue with just the precision and clarity this Court expects in constitutional cases.

In fact, the State's second argument is wholly inconsistent with its "exhaustion" argument. The State candidly argues that Petitioners "were properly held to the choice *which was made for them* by their representative in the collective bargaining agreement." Brief in Opposition at 8 (emphasis added). This assertion clearly joins the constitutional issue. Petitioners claim that a collective bargaining representative cannot bargain away an individual's right to due process; the State claims it can, relying upon the plurality opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 153-154 (1974). ("[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures . . . [employed to divest that right] a litigant . . . must take the bitter with the sweet.") Brief in Opposition at 8.

There is no doubt that the "waiver" theory, adopted in *Antinore* and applied below, fully embraces the positivist position of the *Arnett* plurality, "[H]e [the dismissed civil servant] can no more claim exemption from the negotiated agreement than may a citizen . . . withhold compliance with a statute. . . ." *Antinore* v. *State*, 371 N.Y.S.2d at 217. As Mr. Justice Stevens has pointed out, however, six members of this Court had unequivocally rejected that reasoning. *Bishop* v. *Wood*, 426 U.S. 341, n. 8 at 345 (1976). Thus, the State's position rests upon an interpretation of the fourteenth amendment that this Court has refused to accept. It is that very difference that engenders the intolerable constitutional conflict between the federal judiciary and the state courts in New York, discussed in the Petition for Certiorari at 14-15. Petitioners suggest that the State's justification for the

waiver theory forcefully argues for the grant of the Writ of Certiorari.

Respectfully submitted,

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